VINCENT L. LOWMAN, SR., PLAINTIFF vs. DBP INVESTMENTS, A PARTNERSHIP, WILLIAM PORTER AND DENISE BARROWS, DEFENDANTS, Franklin County Branch, Civil Action-Law No. A.D. 1996-107

Lowman v. DBP Investments

Civil Action - Summary Judgment - Assumption of the Risk

1. Summary judgment may only be granted when there is no genuine issue of material fact and, based on the evidentiary record, moving party is entitled to judgment as a matter of law.

2. Assumption of the risk completely bars recovery by a plaintiff.

3. .Plaintiff will not have assumed the risk if he is left with no reasonable alternative course of conduct.

4. Where a plaintiff chooses to walk across a snow covered sidewalk instead of walking along a busy intersection at a time when rain is beginning to freeze, he cannot be said as a matter of law to have assumed the risk of falling.

5. Defendants may not use assumption of the risk principles as a defense for their failure to clear ice and snow from sidewalks in violation of Borough ordinance.

Michael J. Navitsky, Esquire, Attorney for Plaintiff
James J. Comitale, Esquire, Attorney for Defendant

OPINION AND ORDER

WALKER, P.J., September 6, 1996:

OPINION

Factual Background

Plaintiff, William Lowman, in a complaint filed on August 1, 1994, alleges that he slipped and fell while walking on defendants' sidewalk at approximately 7:00 a.m. on Friday, January 7, 1994. The plaintiff further alleges that his fall was caused by defendants' negligence in failing to clear an accumulation of ice and snow which had remained untreated on the sidewalk for several days.

Defendants denied all allegations in the complaint and raised the affirmative defense of assumption of the risk in their answer with new matter. Plaintiff denied assumption of the risk in his reply to new matter.

Discovery has been completed and the case has been set for trial. Defendants, DBP Investments, A Partnership, William Porter and Denise Barrows, filed a motion for summary judgment. The parties argued and briefed the motion which is now ripe for disposition.

Discussion

A motion for summary judgment may be granted only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Pa.R.C.P. 1035(b). The party who brought the motion has the burden of proving that no genuine issue of fact exists. "All doubts are to be resolved against the granting of summary judgment." *Penn Center House, Inc. v . Hoffman*, 520 Pa. 171, 176, 553 A.2d 900, 903 (1989).

The defendants, DBP Investments (hereinafter "DBP"), allege that they are entitled to judgment as a matter of law because the plaintiff voluntarily assumed the risk of proceeding across the defendants' snow and ice covered sidewalk. Defendants assert that because the plaintiff assumed the risk, any duty they had to clear the walk was negated.

Plaintiff disputes these allegations. He argues that he chose to walk on defendants' sidewalk because he believed it to be the safest of the alternative routes available to him. Plaintiff contends that comparative negligence principles, rather than assumption of the risk standards, apply.

Assumption of the risk acts as a complete bar to recovery by the plaintiff. The question of whether the plaintiff has assumed the risk should not be decided as a matter of law unless it is

> "beyond question that the plaintiff voluntarily and knowingly proceeded in the face of an obvious and dangerous condition and thereby must be viewed as relieving the defendant of responsibility for his injuries."

Long v. Norriton Hydraulics, Inc., 443 Pa.Super. 532, 536, 662 A.2d 1089, 1091 (1995).

On the other hand, comparative negligence apportions the damages based upon the relative negligence of the parties. The task of making the apportionment is for the jury. *Howell v. Clyde*, 533 Pa. 151, 159, 620 A.2d 1107, 1111 (1993). Pennsylvania has adopted comparative negligence principles by statute.

> In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

42 Pa.C.S. § 7102(a).

Defendants contend that the court should find as a matter of law that the plaintiff voluntarily assumed the risk of his injuries, and is therefore barred from recovery because he chose to walk on defendants' unshoveled sidewalk rather than walking in the street at a busy intersection during morning rush hour. Although the defendants were in violation of Chambersburg's Ice and Snow Removal Ordinance by reason of their failure to clear the sidewalk within twenty-four hours after the precipitation ended, they contend that they owed no duty to the plaintiff.

The court disagrees. For assumption of the risk to be voluntary, the plaintiff must have a choice of another means of passage. The Restatement (Second) of Torts § 496 E provides that

> "[t]he plaintiff's acceptance of a risk is not voluntary if the defendants' tortious conduct has left him no reasonable alternative course of conduct in order to avert harm to himself or another. . ."

Pennsylvania courts have adopted the "choice of path" rule.

> "Where a person, having a choice of two ways, one of which is perfectly safe, and the other of which is

> subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover (citations omitted)."

DeFonde v. Keystone Valley Coal Co., 386 Pa. 433, 434, 126 A.2d 439, 439 (1956). However, the rule is not intended to unduly restrict the traveler.

> "Even if the alternative course could be determined hypothetically safer but the one chosen is still free of hazard and authorized by law, a tortfeasor may not escape responsibility for his negligence by maintaining that the person injured through his negligence could have escaped injury by taking the alternative route."

Parnell v. Taylor, 266 Pa.Super. 74, 83, 403 A.2d 100, 104 (1979) (citing *Hopton v. Donora Borough*, 415 Pa. 173, 176, 202 A.2d 814, 815-16 (1964)).

The court is not prepared to say as a matter of law that the plaintiff voluntarily assumed the risk of injury. His alternate route, along a busy intersection at a time when rain was just beginning to freeze, cannot be considered to be a perfectly safe alternative.

The court is further persuaded by plaintiff's argument that the defendants should not be permitted to allow a hazardous condition to result by ignoring the ordinance requiring prompt removal of snow and ice, and then when someone is injured, claim that they had no duty to clear the walkway because the danger was open and obvious. Clearly, the purpose of the ordinance is to protect passersby from falling on slippery sidewalks. The duty to clear the sidewalks is imposed by the ordinance and cannot be negated by defendant's failure to obey that ordinance.

Conclusion

The court is not able to find that beyond question the plaintiff voluntarily and knowingly proceeded in the face of an obvious and dangerous condition. Without such finding, the question of negligence is one for the jury. Therefore, defendants' motion for summary judgment is denied.

ORDER OF COURT

September 6, 1996, the defendants' motion for summary judgment is hereby denied.